

The Planned German Anti-Discrimination Act: Legal Vandalism? A Response to Karl-Heinz Ladeur

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[1] I agree with Karl-Heinz Ladeur (1) that the recent draft of a German 'Anti-Discrimination Law' (2), as presented by the Federal Minister of Justice, Mrs Däubler-Gmelin last November and to be included as §§ 319 a-e *Bürgerliches Gesetzbuch* (BGB -- German Civil Code), is raising a lot of highly difficult legal questions (see below under A.). As far as I can see, the core of Karl-Heinz Ladeur's critique has three parts: (a) that the draft is un-constitutional (and therefore *illegal*), (b) that it does not fit into the liberal German Civil Code, and (c) that it is inconsistent with "common sense". While I feel incapable of judging the last of these points, I disagree with the first (below under B.) and the second (below C.). Apart from the *positivist* side of the matter, I believe that from a *theoretical* viewpoint the draft legislation does not seem very outrageous but rather verifies a known trait of modern Law (below D.).

A. Black sheep among good law?

[2] The proposal for a German "Anti-Discrimination Act," if it becomes final one day at all,(3) will certainly raise a lot of highly difficult questions.(4) The following are only a few examples. The proposed law creates a discrimination claim based on *Behinderung* (disability) but does not define it (does "disability" include an impairment of health, i.e. does it include a latent HIV-Infection?). The same difficulty applies to the use of the term "religion" in the draft legislation (does this also cover controversial religious groups like Scientology?). More importantly, the reversal in the burden of proof provided by the proposed § 319c BGB seems to bear unpredictable consequences since it is not obvious at all what the provision means by stating that the claimant only has to "*glaubhaft machen*" ("plausibly demonstrate") that an act of discrimination has occurred. Of course, this is of highest importance because the burden of proof shifts to the alleged discriminator if the claimant is able to meet this standard (§ 319e BGB). And, to present a final example, the consequences of discriminatory acts, as provided by the proposed § 319e BGB, include *Folgenbeseitigungsanspruch* (a claim for remedial action). This remedy, of course, has never before been used in German Civil Law.(5)

[3] It seems to me, however, that these difficulties can be overcome. Not because I have any idea how to solve them but because I believe that these are difficulties that *necessarily* accompany *any* law, at least any that deals with a new field and that has to regulate a wide range of possible circumstances. This is not only true for law's infamous *Generalklauseln* (blanket clauses) but for law in general. The terms presented in the proposed § 319a BGB are not more vague than numerous legal terms of the German Civil Code that are part of lawyers' every-day-use such as "*Leistung*" (performance), "*Verfügung*" (disposition), "*Unmöglichkeit*" (impossibility), "*Schaden*" (damage), "*Schutzgesetz*" (provision that aims at protecting individual rights) and many more, all of which never would have meant anything to anybody without an active judiciary doing what we euphemistically call *Konkretisierung* (substantiation). In this sense the draft does not seem to be any more unclear or vague than many important provisions of the German Civil Code. Maybe it only needs a dedicated academic treatment to become part of the close-knit jurisprudence of the BGB, which, after all, *Karl-Heinz Ladeur* calls a masterpiece of European legal culture. The same applies for the reversal of the burden of proof: The controlling plausibility standard (*glaubhaft machen*) is, indeed, vague. But it is already part of the Civil Law, in § 611a BGB, and has undergone ample academic and judicial treatment in that manifestation. Finally, the phenomenon of a claim for remedial action (*Folgenbeseitigungsanspruch*) might be new to Civil Law, but, again, I cannot see this, alone, as an argument against the draft legislation.

[4] In order to adequately evaluate the draft I suggest that we, for a thoughtful moment, assume that these uncertainties can be overcome and that, for instance, the plausibility standard for shifting the burden of proof actually does lead to the uncovering and identification of acts of discriminations. Then, and only based on this assumption first, is it possible to examine the constitutional issues associated with the proposed "Anti-Discrimination Act."

B. Unconstitutional?

[5] The main constitutional argument against the proposal is evident. It is freedom, the constitutional freedom of contract and of action. The *Grundgesetz* (GG -- Basic Law) does not, however, explicitly provide for the "freedom of contract". Article. 2 GG, where the principle of *Privatautonomie* (private autonomy) is said to be "located" does not quite speak of a genuine commercial freedom but of "*freie Entfaltung der Persönlichkeit*" ("free development of personality"). Of course, there are very convincing reasons to assume that development of personality must include

freedom of contract. However, freedom as such is also not the first provision of the most important law code of Germany. That ranking is assigned to Article 1 GG, which also does not speak of freedom of contract but of *Würde* (dignity) instead. It is, of course, reasonable to argue that nobody knows what that is. More precisely: no one is or ought to be able to define what "dignity" is, after all, that is what dignity is all about. According to the critics of the proposed "Anti-Discrimination Act," this constitutional protection undermines the anti-discrimination limits the proposed Act places on the freedom to contract. So the argument goes: It is just as much part of my dignity not to be forced to engage with someone that I do not like, not to contract with such a person, and, most importantly from the standpoint of "dignity", not be required to give account of why I like a person or why I do not.

[6] But that is not the case. Article 1 GG is not just a blank check for any existential orientation. It is a legal norm. It is intended to provide *legal consequences* and has done so extensively since 1949. In other words: It means *something*. The starting point of any interpretation can only be the historical foundation, that is, the broader contextual reasons the founders gathered to draft and implement a Constitution, including the dignity provision of Article 1. They meant the provision to be a *legal* reaction to the crimes committed in the "Third Reich". And they thought these discriminatory monstrosities had resulted from or at least reflected a contempt of every person's inherent *dignity*. Therefore, the protection of personal dignity is undisputedly the highest (legal!) value of the German legal system and, at the same time, the most important mandate to *any* legal arrangement. If this analysis holds, discrimination that regards personal features as being expressions of individual dignity and that are therefore based on the same structural attitudes as those prevailing in the "Third Reich" are *legally* unacceptable. The Constitution does not require a person to accept a lesbian as a tenant, it does not demand that people eliminate their disapproving thoughts and does not require me to contract with somebody I "do not like", but it demands that nobody can be discriminated for his race, skin colour etc. without legal sanctions.

[7] It is important to note how it is that the constitution can play any role in private affairs, as constitutions are typically conceived as a check only on State authority and power. For German legal scholars it has been clear for quite some time that *Grundrechte* (constitutional basic rights) are not only *Abwehrrechte* (mere defensive rights as against the State) but they also represent an "order of objective values" ("*objektive Wertordnung*"). The basic rights thereby gain a horizontal function, which is to say they have an (indirect) effect on private arrangements forged by Civil Law (*mittelbare Drittwirkung*). To this very day, however, this insight seems to be overlaid by an incorrect perception of the mere defensive function of basic rights being the "classical" function and the objective/law-changing being a new and somewhat strange invention developed and implemented by an almighty Federal Constitutional Court that has no respect for Civil Law and his uniqueness. From the standpoint of legal history this view is wrong. Neither in Germany nor in France did basic rights originate as mere defensive mechanisms only to develop their objective function afterwards. Instead, in both constitutional cultures, basic rights started out as the latter.⁽⁶⁾ It fits the picture that there is a tendency to overly stress the constitutional *Rechtsstaatsklausel* (provision guaranteeing the rule of law) to the disadvantage of the *Sozialstaatsklausel* (welfare-state-provision) in order to enforce an alleged constitutional principle of "in dubio pro libertate", that by the way was not written into the GG. Instead, welfare state and rule of law are eventually equal columns of our Constitution.⁽⁷⁾ Of course numerous liberty rights are guaranteed and any interference with them requires special justification. But a look at just the last 12 months of constitutional adjudication is enough to see that these liberties, whether freedom of speech or freedom of contract, have always been restricted by and reflected in the mirror of Germany's "Third Reich" history. Similarly, the welfare state rights secured by the Basic Law are characterized and reflective of German's unique tradition of Corporatism and Welfare.⁽⁸⁾ As a result, I cannot see that there is a virgin part of the Constitution in which any kind of unbound, immaculate freedom would rule.

[8] In this light, it seems implausible to me that a constitutional provision like that which provides protection for the institutions of marriage and family (Article 6 par.1 GG) could possibly serve as a warrant for discriminating against homosexuals. It may be constitutionally supportable when a landlord privileges "nuclear families", discriminating against potential tenants only because of their deviant sexual orientation, however, cannot be supported by the constitution. In the past, Article 6 par.1 GG has often been the focus of attempts to extract a constitutional right from the Basic Law, even if that right is not in there. When the *Lebenspartnerschaftsgesetz* (Equal Treatment Act regarding homosexual partnerships) was enacted, an important part of the scholarly community regarded it as unconstitutional for homosexuals to join into a partnership because of the "harm" this would do to the special constitutional respect for (heterosexual) marriages and families. Again, there was truly no *legal argument against* the project. Because of Articles 4 and 140 GG *cannot* mean a Christian/Catholic heterosexual marriage only,⁽⁹⁾ and if its objective is to lend support to families based on the close human connection they represent and generate, there is then no (non-discriminatory) argument for denying a homosexual family the same support (especially since it has not been proved yet that gay relationships are any more fragile than heterosexual ones). This is perhaps only the most obvious recent misuse of Article 6 par.1 GG for purposes that are genuinely political. Today even the secular bible of German Civil Law jurisprudence, the "Palandt", cautiously admits that Article 6 par.1 GG as such does not "determine" whether the Constitution is against gay marriage but instead that it is a "*Wertungsfrage*"⁽¹⁰⁾ (question of assessment), whatever that may be.

[9] Finally, Article 3 par. 3 GG is the strongest proof that the Constitution requires equal treatment. While freedom of contract is not explicitly provided by the Constitution, the Constitution does explicitly forbid discrimination based on race, religion etc. And, while it is indeed questionable whether the principle of equal treatment requires compliance in private relations or whether it merely provides protection from public actions, it is hard to see that it should *prevent* legal action (in this case, legislation) that serves to minimize one of the forms of discrimination identified by Article 3 GG. In any event, the jurisprudence seems to agree upon the (indirect) horizontal effect of Article 3 par. 3 (prohibiting discrimination based on gender, race etc.).(11)

[10] *Privatautonomie* (private autonomy, comprising 'freedom of contract') as it is protected and guaranteed in Article 2 par. 1 GG is the only plausible constitutional argument against the draft legislation. If it is enough to spread out a 'liberal theory of rights' (Ladeur) in this context, I may not have to decide. One thing that is rarely considered in the criticism of (an allegedly freedom-destroying) draft 'Anti-Discrimination Act' is the *constitutional* fact that those who are subject to discrimination have a constitutional right of freedom of contract in the same measure as those who would like to invoke their freedom of contract to discriminate against them. Due to the discrimination the freedom of the subjects of discrimination is limited. Viewed this way, a law that aims at restoring this right (to contract free from discrimination) not only violates individual freedom (preventing one from engaging in discriminatory contractual choices) but at the same time restores it.

C. Farewell to a liberal German Civil Code?

[11] The phenomenon of *Kontrahierungszwang* (imposed obligation to contract) is not an invention of the Anti-Discrimination Act. It is a well-known (even though not very often addressed) institution in German Law. In 1980, Wolfgang Kilian identified at least 33(!) different provisions positively imposing an obligation of contract.(12) Also, German jurisprudence has widely recognized an unwritten obligation of contract due to violation of *bona mores / bona fides* based on §§ 826, 249 BGB, particularly in cases involving an abuse of a monopoly over products that are essential to life.(13) To state that this consequence could not be applied to discriminatory conduct does not seem to be very plausible. How could racial discrimination not be considered to be against *bona mores* when an abuse of monopoly is? The blanket clause of "*bona mores*" as provided in §§ 138, 826 BGB cannot be interpreted as any kind of prevailing social standard based on "custom". Instead the meaning of the standard can only be drawn from the fundamental valuations of the legal system itself: "immorality" means legal immorality.(14) The highest legal entity, of course, is the Constitution. If this is true, then discrimination *must* violate *bona mores* because they severely violate constitutional provisions. It must, therefore, be possible to sanction discrimination in the way stated by §§ 826, 249 BGB, eventually leading to obligation of contract.(15)

[12] Of course, this view is not prevalent. In the most extensive commentary on § 826 BGB, out of 188(!) pages there is not a single remark concerning racial or other forms of discrimination as a possible violation of *bona mores*.(16) Since courts have not been unanimous in granting an obligation of contract by way of §§ 826, 249 BGB in such cases, for victims of discrimination there has effectively been no way of pursuing legal actions against discriminatory behaviour, other than a usually unsatisfactory compensation for suffering pain (*Schmerzensgeld*). In the face of these uncertainties, from a constitutional standpoint it is not completely persuasive to state that Article 3 GG imposes a legal *obligation (Schutzpflicht)* on the parliament to enact an effective Anti-Discrimination Law.(18) As a student, I would also like to remark that it seems rather odd to me that the "threatened" imposition of an obligation to contract as a result of racial or other forms of discrimination has provoked such an outcry in the legal profession, emphatically announcing the end of freedom and private autonomy. Meanwhile, the obligation of contract imposed on German students for many years now by the so-called "Semestertickets", which reside in a legal no-man's-land (not to say: are illegal), is still being forced upon students with scarce notice.(19)

[13] Why, then, this outrage concerning the proposed "Anti-Discrimination Act"? It is obvious that this is due to a *feeling* that the once liberal face of the German Civil Code has been deeply infringed by the German Basic Law and its hubristic interpreters at the Federal Constitutional Court. In this view, the BGB was created at the alleged heyday of liberalism in Germany and is the product of a liberal jurisprudence not tainted by social considerations. Usually this perception has been promoted in order to justify social interventions into an overly liberal and socially blind BGB. This time it is apparently to be used to prevent "intrusions" by an illiberal Parliament aiming at destroying the liberal foundations of the BGB. Like the Vandals once destroyed the cultural masterpieces of Rome, the Vandals in Berlin are now seeking to destroy the national treasure that is the BGB.

[14] This perception is based on a myth. The BGB is not the product of socially blind Pandectists who only copied liberal-individualist Roman law and unwaveringly believed in Liberalism. Social considerations were, in fact, so dominant in 19th Century jurisprudence that it is almost impossible to find the term "*Privatautonomie*" (private autonomy) in legal discourses from that era.(20) The drafters of the BGB widely considered "social issues", and the German Civil Code has embodied these considerations.(21) Its controlling concept has never been untamed

freedom.(22) Nevertheless, this myth, once eloquently introduced by Otto von Gierke's famous critique of the first draft, has played a central role in legal discourses ever after.(23)

[15] The myth also conceals the fact that there has always been a strong welfare tradition in Germany, ultimately unperturbed by overly liberalist tendencies as proclaimed and performed in England or the USA. Thus social responsibility, public welfare and governmental interference are the key notes of German (legal) history.(24) If we are talking about a "liberal society" we should keep these parameters in mind. But then, where does a "liberal legal theory" (Ladeur) come from? The grounds for it are certainly thinner here than, for example, in the USA, where liberal views have been part of mainstream legal discourses and continue to be.(25) But there is another reason why I believe an "Anti-Discrimination Act" fits into the picture.

D. The hypertrophy of Law

[16] Modern Law is dispersing into more and more areas. This hypertrophy of modern Law is inherent. As transcendent authorities have increasingly lost their power, the Law has increasingly filled the gaps. At the same time, in the face of changing threats to personal freedom, Law is not only protecting but *providing* human liberties. Today in many respects there is only "constituted freedom" ("*konstituierte Freiheit*").(26) Under these circumstances prevention becomes highly important.(27) The draft legislation aims at nothing else: It intends to *prevent* future discriminations by using a legal sanction. And it interferes with a sphere that was thought to be inviolable as far as "intimate" personal decisions are concerned. Now we know that they are not. They cannot be in the face of Law's almighty expansion. We may regret this but I do not believe that we can simply change it, at least not by assuming the continued existence of a mere liberal/defensive nature of the Law that it lost a very long time ago.

[17] I agree with Ladeur that "there is a legal rationality which is different from morality". But the draft is not part of social morality. It is a legal provision and (meant to be) hard-boiled Law. The moral issues underlying the Act are *not* "solved" in any way. Instead they are transposed onto the sphere of Law where they are just put into a different, a legal context. That is why there will be an "Anti-Discrimination Act": The social conflict at the very core of any discrimination cannot be solved on grounds of social morality. It only seems possible to transform it into legal discourses consisting of "Constitutionality," "balancing," "historic-teleological view," etc. This transfer may not be a "solution" but it is inevitable. Without it the conflict could not be solved at all.

(1) Ladeur, *The German Proposal of an "Anti-Discrimination" Law: Anti-constitutional and Anti-common sense*, 3 GERM. L. J. 5, 1 May 2002 (<http://www.germanlawjournal.com>, search Anti-Discrimination).

(2) See, N. Venneman, *The German Draft Legislation On the Prevention of Discrimination in the Private Sector*, 3 GERM. L. J. 3, 1 March 2002 (<http://www.germanlawjournal.com>, search Anti-Discrimination).

(3) Recently, there have been doubts that the proposal will be put into force, at least before the September elections, since Chancellor Schröder presently seems not to be in favor of the proposal. See, e.g., TAZ 13 April 2002.

(4) See the following for the recent critique by H. Wiedemann/G. Thüsing, *Fragen zum Entwurf eines zivilrechtlichen Anti-Diskriminierungsgesetzes*, DER BETRIEB 2002, p.463.

(5) Wiedemann/Thüsing, id.

(6) See, D.Grimm, *Rückkehr zum liberalen Grundrechtsverständnis?*, in: *ibid.*, DIE ZUKUNFT DER VERFASSUNG 221 (1991). Skeptical towards this "traditional" defensive function for other reasons, see, K.-H. Ladeur, *Klassische Grundrechtsfunktion und "post-moderne" Grundrechtstheorie*, KRITISCHE JUSTIZ 1986, p.197.

(7) Made very clear by Denninger/Hoffmann-Riem/Schneider/Stein, Vorwort, in: GRUNDGESETZ, ALTERNATIV-KOMMENTAR, 3rd Ed., 2001.

(8) See, only for the last 12 months, the decisions *Bundesverwaltungsgericht - BVerwG* (Federal Administrative Court), in: *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*2001, p. 1410; BVerwG, NVwZ 2001, 1413; BVerwG, NJW 2002, 155 (concerning National Socialist behaviour by civil servants and soldiers) and BVerfG, NVwZ 2002, 335 (concerning constitutionality of compulsory membership in a chamber of commerce).

(9) For a discussion of the dubiousness of a Christian God in the constitution, see, Zuleeg, in: AK-GG, 3rd Ed., Präambel, Rn.10f.

- (10) Palandt-Brudermüller, Bürgerliches Gesetzbuch (BGB), 61st. Ed., Einl LebensPartG Annotation 2.
- (11) Heun, In: Dreier, GG (1996), Art. 3 Annotation 123.
- (12) W.Kilian, *Kontrahierungszwang und Zivilrechtssystem*, AcP 180 (1980), at p. 53.
- (13) Staudinger-Bork, Introductory remarks to §§ 145 ff. (1996), Annotations 12-35.
- (14) See, only D.Schwab, EINFÜHRUNG IN DAS ZIVILRECHT Margin 586 (2000).
- (15) T. Bezenberger, *Ethnische Diskriminierung, Gleichheit und Sittenordnung im bürgerlichen Recht*, AcP 196 (1996), p. 295.
- (16) Staudinger-Oechsler, *Kommentar zum bürgerlichen Gesetzbuch*, commentary to § 826 BGB (1998).
- (17) See, R. Nickel, *Rechtlicher Schutz gegen Diskriminierung. Ein Leitfaden* (1996) (published by the City's Office For Multicultural Affairs - *Amt für multikulturelle Angelegenheiten*, Frankfurt).
- (18) See, R. Nickel, GLEICHHEIT UND DIFFERENZ IN DER VIELFÄLTIGEN REPUBLIK. PLÄDOYER FÜR EIN ERWEITERTES ANTIDISKRIMINIERUNGSGESETZ (1999).
- (19) See, M. Siemon, Das Semesterticket – Juristisches Niemandsland, JA 1998, p.257; but see the two Decisions of the *Bundesverfassungsgericht* (Federal Constitutional Court - FCC) of the year 2001, holding up the Semestertickets with a longer discussion of the legal merits.
- (20) S. Hofer, FREIHEIT OHNE GRENZEN? PRIVATRECHTSTHEORETISCHE DISKUSSIONEN IM 19.JHDT. (2001).
- (21) Made clear recently by Schröder/Thiessen, *Von Windscheid zu Beckenbauer – die Schuldrechtsreform im Deutschen Bundestag*, in: *Juristenzeitung* (JZ) 2002, p. 325 (on the occasion of the most recent Law reform observably driven by these myths).
- (22) T. Reppen, *Was war und wo blieb das soziale Öl?*, ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 2000, p. 406.
- (23) D. Schwab, *Das BGB und seine Kritiker*, ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 2000, p. 325; Kl. Luig, *Römische und germanische Rechtsanschauung, individualistische und soziale Ordnung*, in: DIE DEUTSCHE RECHTSGESCHICHTE IN DER NS-ZEIT: IHRE VORGESCHICHTE UND IHRE NACHWIRKUNGEN 95 (J. Rückert/D. Willoweit eds., 1995).
- (24) M. Stolleis, *Die Entstehung des Interventionsstaates und das öffentliche Recht*, ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 1989, p. 129.
- (25) M. Friedman, CAPITALISM AND FREEDOM (1962); B. Benson, THE ENTERPRISE OF LAW, (1990); M. Rothbard, THE ETHICS OF LIBERTY (1998); E. Stringham, Market Chosen Law, 14 JOURNAL OF LIBERTARIAN STUDIES 53 (1999). See, also, Holmes, THE COMMON LAW 96 (34th Ed. 1949): "State interference is an evil, where it cannot be shown to be a good". In Germany the very rare claims for a "liberal law" are themselves caught in "ethical" approaches. See, D. Reuter, *Die ethischen Grundlagen der Privatrechts – formale Freiheitsethik oder materiale Verantwortungsethik?*, in: AcP 189 (1989), 199ff.; M. Wallerath, *Der ökonomisierte Staat*, JZ 2001, 209 ff.
- (26) The term is taken from G. Lübbe-Wolff, DIE GRUNDRECHTE ALS EINGRIFFSABWEHRRECHTE, 75 (1988).
- (27) See, generally, D.Grimm, Verfassungsrechtliche Anmerkungen zum Thema Prävention, KRITV 1986, p. 38.